North Essex Garden Communities

Introduction

1. This is a summary of advice that has been given to NEGC Ltd and Braintree District Council, Colchester Borough Council, Tendring District Council (together the North Essex Authorities, "**NEAs**") and Essex County Council. It is a composite of advice from David Elvin QC, Avison Young and Dentons over the period from early 2018 to date.

2. The NEAs have been working together to plan for strategic cross-boundary issues across their administrative areas. On 9 October 2017 the three NEAs individually submitted draft Local Plans to PINS for examination. Each of the draft Local Plans contains two sections:

   (1) Section 1 which includes policies on strategic cross boundary issues including proposals for three new Garden Communities. The drafting of Section 1 is common to all three Local Plans (see Document 1) ("**Section 1**"); and

   (2) Section 2 which includes individual site allocations and development management policies which are specific to the relevant authority ("**Section 2**").

3. These sections will, once adopted, together comprise the respective Local Plan for each authority. Section 1 will establish the in-principle acceptability of the garden communities, with the detailed design, development and phasing for each garden community established through development plan documents. Since the three Sections 1 are common, they are subject to a joint plan examination.

4. Various delivery models have been considered for the garden communities. In light of amended provisions of the New Towns Act 1981 ("**NTA 1981**") it is possible that the NEAs will seek the designation of the garden communities as "locally-led new towns" and the establishment of one or more locally-led new town development corporation to deliver the garden communities. These would be overseen by the four Councils as the oversight authority.

5. Any development corporation would have the benefit of CPO powers, which could be exercised with the consent of the oversight authority, subject to the confirmation of any CPO by the Secretary of State.

6. This raises a number of questions:

(1) the application of the no-scheme principle to the garden communities and the characterisation of the 'new town scheme';

(2) the risks and implications of a phased approach to compulsory acquisition within individual garden communities;

(3) the approach to the valuation of options;

(4) the suggestion that the options themselves have a 'hope value' separate to the market value and any compulsory acquisition could be challenged on human rights grounds.

Relevant Legislation

7. S. 1 of the NTA 1981, provides for the designation of areas for new towns by the Secretary of State:

> '(1) If the Secretary of State is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town."

8. S. 10 provides for the compulsory acquisition of land for such new towns by development corporations established to deliver them:

> "(1) A development corporation may, with the Secretary of State's consent, acquire by agreement, or may, by means of an order made by the corporation and submitted to and confirmed by the Secretary of State in accordance with Part I of Schedule 4 to this Act, be authorised to acquire compulsorily—
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> (a) any land within the area of the new town, whether or not it is proposed to develop that particular land;
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> (b) any land adjacent to that area which they require for purposes connected with the development of the new town;
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> (c) any land, whether adjacent to that area or not, which they require for the provision of services for the purposes of the new town."

9. The Neighbourhood Planning Act 2017 added s. 1A to the NTA 1981 and the New Towns Act 1981 (Local Authority Oversight) Regulations 2018 ("**the 2018 Regulations**") made further modifications. Reg. 3 of the 2018 Regulations provides that an authority appointed under s. 1A of the NTA 1981 is to exercise certain functions of the Secretary of State under the NTA 1981. For present purposes the most important of these are:

(1) The powers under s. 10(1) of the NTA 1981 above, but not the function of confirming a compulsory purchase order which remains with the Secretary of

State; and

(2) The powers under Schedule 3 to the NTA 1981.

10. S. 14 of the NTA 1981 provides that the Land Compensation Act 1961 ("**LCA 1961**") has effect for the purposes of the NTA 1981, "*subject to any necessary adaptations and to Part II of Schedule 6*".

11. The LCA 1961 was amended by the Neighbourhood Planning Act 2017 and provides a new form of statutory disregards intended to sit alongside the current judge made rules:

> "**6A No-scheme principle**
>
> (1) The no-scheme principle is to be applied when assessing the value of land in order to work out how much compensation should be paid by the acquiring authority for the compulsory acquisition of the land (see rule 2A in section 5).
>
> (2) The no-scheme principle is the principle that—
>
> (a) any increase in the value of land caused by the scheme for which the authority acquires the land, or by the prospect of that scheme, is to be disregarded, and
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> (b) any decrease in the value of land caused by that scheme or the prospect of that scheme is to be disregarded.
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> (3) In applying the no-scheme principle the following rules in particular (the "no-scheme rules") are to be observed.
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> (4) Rule 1: it is to be assumed that the scheme was cancelled on the relevant valuation date.
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> (5) Rule 2: it is to be assumed that no action has been taken (including acquisition of any land, and any development or works) by the acquiring authority wholly or mainly for the purposes of the scheme.
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> (6) Rule 3: it is to be assumed that there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers.
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> (7) Rule 4: it is to be assumed that no other projects would have been carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers if the scheme had been cancelled on the relevant valuation date.
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> (8) Rule 5: if there was a reduction in the value of land as a result of—
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> (a) the prospect of the scheme (including before the scheme or the compulsory acquisition in question was authorised), or
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> (b) the fact that the land was blighted land as a result of the scheme,
>
> that reduction is to be disregarded.
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> (9) In this section—
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> "blighted land" means land of a description listed in Schedule 13 to the Town and Country Planning Act 1990;
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> "relevant valuation date" has the meaning given by section 5A.
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> (10) See also section 14 for assumptions to be made in respect of planning permission."

12. S. 6D(1) and (2) provides:

> "**6D Meaning of "scheme" etc.**
>
> (1) For the purposes of sections 6A, 6B and 6C, the "scheme" in relation to a compulsory acquisition means the scheme of development underlying the acquisition (subject to subsections (2) to (5)).
>
> (2) Where the acquiring authority is authorised to acquire land in connection with the development of an area designated as—
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> (a) an urban development area by an order under section 134 of the Local Government, Planning and Land Act 1980,
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> (b) a new town by an order under section 1 of the New Towns Act 1981, or
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> (c) a Mayoral development area by a designation under section 197 of the Localism Act 2011,
>
> the scheme is the development of any land for the purposes for which the area is or was designated."

13. S. 13C of the LCA 1961 allows confirmation of a CPO to be made in stages if certain conditions are met: see also paras. 45 and 46 of Tier 1 of the February 2018 version of MHCLG's *Guidance on Compulsory purchase process and the Crichel Down Rules*. Acquisition could take place either by way of a single CPO for each garden community or a phased series of CPOs to acquire land over a longer period, possibly even up to several decades.

The "no-scheme principle"

14. On the face of the legislation, the terms of s. 6D are clearly intended to ensure that in the case of the acquisition of land for the provision of a new town designated under s. 1 of the NTA 1981, the "scheme" for the purposes of s. 6A (and ss. 6B and 6C) is the development of any land for the purposes for which the area is or was designated. In short the proposed scheme for the new garden community will be disregarded for the purposes of assessing CPO compensation.

15. MHCLG's *Draft compulsory purchase guidance – new town development corporations* (Part 4 and Annex D to the MHCLG's *Planning Reform: Supporting the high street and increasing the delivery of new homes*, October 2018). Para. 4.9 states:

> "4.9 Compensation is not covered in the draft guidance at Annex D. This is because the assessment of compensation is separate from the confirmation process for compulsory purchase orders, with disputes settled in the Upper Tribunal (Lands Chamber). Furthermore, our existing guidance on compulsory purchase process already provides an overview of compensation, and the special provision made in respect of new town, urban and mayoral development corporations. In these areas, 'the scheme' to be disregarded for the purposes of assessing compensation is the development of any land for the purposes for which the area is or was designated. The means that the value of later acquisitions will not be influenced by earlier development."

16. Whilst the above statement is only the view of the Government rather than the view of the Courts, it provides clarity on what it considered the purpose/effect of the provisions to be. The statement also reflects the discussions held at the time with MHCLG about how compensation should be assessed in the no scheme world following the introduction of the statutory changes.

17. Accordingly, in a "no scheme" world any land being acquired would be acquired at market value disregarding the identified scheme. The market value of the land acquired will reflect the existing use value and the likelihood of development in the absence of the proposed garden community. In some cases there will be some potential development value that would exist in the absence of the proposed garden community; if there is then that hope value will be reflected in the market value compensation. However, a review by Avison Young, informed by the NEA, of the potential development value of the land within the garden community areas of search indicates that the majority of the land identified has limited development potential in the absence of the proposed garden communities. Where there are any such development values any compensation would be calculated to take into account all proper policy requirements in relation to infrastructure, affordable housing, design quality and sustainability.

18. Although it is not the intention of the legislation, the language of s. 6A and s. 6D, if the original scheme designated needs to be changed at some point in the future, may leave it open to a landowner whose interest is acquired at some date in the future, following initial acquisitions, to argue that the baseline for the valuation includes the initial phases of the development. In these circumstances, the phasing of CPOs could carry a risk to the application of the no-scheme principle.

19. This potential issue makes it essential that when the areas are designated care should be taken to ensure that the designation is broad enough to include future expansion[1] and acquisition and that its purposes are clearly spelled out to reduce as far as possible any later uncertainty. Any designation will also need to be clear about whether the proposed works to the A12 and the A120 form part of the "scheme".

Valuation of options and "hope value"

20. It is noted that option and other contract arrangements have been entered into in relation to land within the proposed garden communities.

[1] See the MHCLG Guidance on the 2018 Regulations (June 2018).

21. The existence and/or exercise of an option does not inflate the compensation payable under the statutory compensation code – unless there is distinct development or hope value arising otherwise than by virtue of the scheme.

22. In this context, it is relevant to note:

    (1) The market value of land recoverable as compensation is subject to the no-scheme principle and disregards any increase (or decrease) in land value;

    (2) The effect of a scheme in terms of compensation may be felt prior to the making of the CPO and the "shadow" of the scheme may allow it to be taken into account (subject to proving causation) in effects on value prior to acquisition. See ***Director of Buildings and Lands v. Shun Fung Ironworks*** [1995] 2 A.C. 111 at 135-137 applying ***Prasad v. Wolverhampton BC*** [1983] Ch. 333;

    (3) Whilst the recovery of compensation is based on the principle of equivalence, it is also subject to proof of causation, and on the basis that the claim must not be too remote and that the claimant has acted reasonably. See ***Shun Fung*** at p. 126 and Lord Nicholls' three conditions.

23. Options entered into in anticipation of the future scheme for the new town may fall to be disregarded if it can be shown as a matter of valuation evidence that the market value would not be the same as the value fixed under the option and that the option was fixed having regard to the scheme.

24. If an option fixes a higher price than the no-scheme world value and it is contended that there is loss of the contractual entitlement:

    (1) Most options will not require an option to be exercised by the holder of it and it is unlikely that an option holder would exercise an option for more than market value (particularly if any compensation will be calculated disregarding the scheme);

    (2) If the option holder chooses to exercise it and then claim a higher value, or the landowner contends that it would be exercised, or even there is hope that it would be exercised, there are a number of strong arguments against this –

        (a) The lack of reality in an option holder exercising an option to pay more than market value;

        (b) The no-scheme principle i.e. the point noted above that the option is a scheme world agreement and this is no more than an attempt to inflate

the no-scheme world value;

(c) That the option holder would not be acting reasonably in seeking to pay a sum higher than the value of the land in the context when it would have been entered into in the knowledge of the no-scheme principle.

25. Equivalence may require that development or hope value is recoverable, but that value must reflect the no-scheme principle and will depend on the circumstances as they stand at the valuation date, which is generally the date the acquired property vests. S6A will limit any hope value to the no-scheme world and independent even of development resembling the CPO scheme. Not only does rule 2 (s. 6A(5) apply but also rules 3 and 4 (ss. 6A(6) and (7), above) which require it to be assumed that -

(1) there is no prospect of the same scheme, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers; and

(2) no other projects would have been carried out in the exercise of a statutory function or by the exercise of compulsory purchase powers if the scheme had been cancelled on the relevant valuation date.

26. Any attempt by the landowners/option holders to raise hope value which is considered to arise from the CPO scheme should be met by reliance on s. 6A(1) and (2) and 6D and Rules 2 to 5 in s. 6A(5)-(7) as discussed above and in accordance with the valuation expert's view at the time.

Human Rights issues

27. The approach outlined to options or hope value (and the "no scheme" principle itself) is extremely unlikely to violate the principle of the European Convention on Human Rights.

28. Article 1 of the First Protocol ("**A1P1**") protects the undisturbed enjoyment of possessions (which includes real property rights) unless interference can be justified by proportionate interference by the state which strikes a fair balance between the public justification for expropriation and the private rights of the landowner. See e.g. ***James v. UK*** (1986) 8 EHRR 123 at para. 50:

> "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of

the protection of the individual's fundamental rights (… para. 69)."

29. This corresponds to national CPO Guidance and the long-standing requirement for there to be a compelling case in the public interest.

30. In general, provided that reasonable compensation is payable reasonably related to the value of the property, the interference will be proportionate and not violate A1P1. In ***James*** the Court held (emphasis added):

> "54. The first question that arises is whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1, the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State.
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> Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.
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> The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.
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> …
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> 56. As to the first head of complaint, the 1967 basis of valuation, the effect of which is that the tenant pays approximately the site value but nothing for the buildings on the site, clearly and deliberately favours the tenant. It was designed to give effect to the view underlying the whole of the contested legislation, namely that 'in equity the bricks and mortar belong to the qualified leaseholder' because of the money he (or his predecessor in title) paid out initially as a capital sum and has then spent over the years on repairs, maintenance and improvements to the house. In effect, the tenant and his predecessors are deemed already to have paid for the house. That assessment of the factual situation, so the Court has held, is one which Parliament was entitled to adopt and act on in the public interest. On the view that Parliament took, it logically follows that 'in equity' the tenant should only be required to pay for that part of the property which he has not already paid for, that is the value of the ground. The 1967 basis of valuation, although it excludes the 'merger value', does compensate the landlord for the existing investment value of his interest in the ground. The objective pursued by the leasehold reform legislation is to prevent a perceived unjust enrichment accruing to the landlord on the reversion of the property. In the light of that objective, judged by the Court to be legitimate for the purposes of Article 1, it has not been established, having regard to the respondent State's wide margin of appreciation, that the 1967 basis of valuation is not

> such as to afford a fair balance between the interests of the private parties concerned and thereby between the general interest of society and the landlord's right of property."

31. The principle emphasised above has been restated many times, including more recently in ***Vistins v Latvia*** (2014) 58 EHRR 4 at [110]-[119]. At [111]-[112] the Court held:

> "111 Moreover, the Court reiterates that, where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation. As to the amount of the compensation, it must normally be calculated based on the value of the property at the date on which ownership thereof was lost. Any other approach could open the door to a degree of uncertainty or even arbitrariness.
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> 112 However, art.1 of Protocol No.1 does not guarantee a right to full compensation in all circumstances. 51 Admittedly, a total lack of compensation can be considered*136 justifiable only in exceptional circumstances. 52 Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value 53 ; in such cases, the compensation does not necessarily have to reflect the full value of the property in question."

32. In ***Lithgow v United Kingdom*** (A/102) (1986) 8 EHRR 329 the Court rejected claims that the compensation payable on the nationalisation of shipyards in 1977 was disproportionate and rejected the view that different methods of calculating compensation should have been adopted. The decision to nationalise at a value fixed at a certain date and by reference to a single basis of compensation fell within the UK's margin of appreciation. The margin of appreciation to allow recovery of a less sum than "full value" was confirmed in ***Vrzic v Croatia*** (43777/13) (2018) 66 E.H.R.R. 30 where there had been a forced sale of a house to pay off outstanding debts and the state rules that allowed a reduced price to be obtained in certain circumstances below the assessed value of the property was in breach of A1P1. The Court held at [100]-[106] that the provisions fell within the state's margin of appreciation.

33. The application of the no-scheme principle to land values including hope value is not in breach of A1P1 since the application of that principle is to ensure that that landowners receive fair value for the property taken but at the same time preventing their taking advantage of the fact that a CPO is being brought forward at the risk and expense of others, and that it provides the value of the land to the owner rather than the value to the developer. The landowner is getting full compensation for the loss suffered on the basis of its value at the time of acquisition but not allowing for its inflation by the scheme itself.

34. Development and hope value remains recoverable to the extent that it can be demonstrated to exist regardless of the CPO scheme. See e.g. ***TfL v. Spirerose Ltd***

[2009] 1 W.L.R. 1797.

35. The purpose of the no-scheme rule and its latest manifestation in the amendments to s. 6 of the LCA 1961 fall within the Government's margin of appreciation in determining that compensation should be based on value to owner and should disregard increases in value resulting from the actions of public authorities to acquire land for a scheme using powers exercisable only in the public interest.